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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 679

UNITED STATES OF AMERICA, *Respondent,*

v.

WASHINGTON TOLL BRIDGE AUTHORITY, *Petitioner.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS (NINTH CIRCUIT)

JOHN J. O'CONNELL,
Attorney General,

JOHN W. RILEY,
Special Assistant Attorney General,

Attorneys for Petitioner.

Office and Post Office Address: Temple of Justice, Olympia, Wash.

STATE PRINTING PLANT, OLYMPIA, WASH., 1962

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INDEX

		Page
A.	REFERENCE TO OFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW (Rule 23-1(a))	8
B.	JURISDICTION	9
C.	QUESTIONS PRESENTED	10
D.	CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED	11
E.	STATEMENT OF THE CASE	11
F.	REASONS JUSTIFYING REVIEW OF THIS CASE (Rule 19-1(b))	17
G.	DISCUSSION AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT (Rule 23-1(h))	18
	(1) The Court of Appeals Has Decided an Important Question of Constitutional Law Which Has Not Been, But Should Be, Decided by This Court	18
	(2) The Court of Appeals Has Decided an Important Question of Statutory Construction of a Federal Statute Has not Been, But Should Be, Decided by This Court	22
	(3) The Court of Appeals Has Decided an Important Federal Question in Conflict With Decisions of This Court	24
	(4) Ohio v. Helvering, 292US360 and New York v. United States, 326US572 Should Be Reviewed and Reconciled	25
	(5) The Court of Appeals Has Decided an Important Federal Question in Conflict With Decisions of Other Courts of Appeal	27
	(6) The Court of Appeals Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call For an Exercise of This Court's Power of Supervision	29

INDEX—Continued

Page

Appendix A: Decision of U. S. Court of Appeals (9th Cir.) (307 F. (2d) 330 (1962)) Reversing 190 F. Supp. 95. ..... A1-A14

Appendix B: Order of U. S. Court of Appeals (9th Cir.) Denying Petition for Rehearing and Denying Motion for Order to Remand (Sept. 26, 1962). B-1

Appendix C: Decision of United States District Court in and for the Western District of Washington, Southern Division (190 F. Supp. 95 (1960)) C1-C7

Appendix D: Decision of the United States Court of Appeals (9th Cir.) (281 F. 686 (1922)) D1-D9

Appendix E: Text of Federal Statutes Involved in These Proceedings..... E1-E4

Appendix F: Petitioner's Alternative Motion before the U. S. Court of Appeals for Order to Remand, etc..... F1-F21

TABLE OF CASES

Allen v. Regents of the University System of Georgia, 304 U. S. 439 (1938) 21, 22

Deans v. County of Coconino, 41 Ariz. 253, 17 P. (2d) 801 13

Gairing Tool Co. v. Eclipse Interchangeable Counterbore Co., 48 F. (2d) 73, 75-66 (CCA-6th, 1930) 31

Gross v. Washington State Ferries, 159 Wash. Dec. 252, 367 P. (2d) 600..... 13

Helvering v. Gerhardt, 304 U. S. 405 (1938).. 20

TABLE OF CASES—Continued

Page

Jamestown Newport Ferry Co. v. Commissioner of Internal Revenue, 41 F. (2d) 920....28, 29

Jeff Hunt Machinery Co. v. South Carolina State Highway Department, 217 S. C. 423, 60 S. E. (2d) 859..... 13

McCulloch v. Maryland, 4 Wheat 316, 41 L. ed. 909 25

New York v. United States, 326 U. S. 572, 90 L. ed. 326, 66 S. Ct. 310 (1946) 17, 20, 22, 25, 26, 27

Ohio v. Helvering, 292 U. S. 360, 78 L. ed. 1307, 54 S. Ct. 725 (1934) 11, 17, 21, 22, 24, 25, 26, 27

Puget Sound Navigation Co. v. Department of Public Works, 156 Wash. 337, 287 Pac. 52 (1930) 13

Savage Truck Line v. Commonwealth, 193 Va. 237, 68 S. E. (2d) 510..... 13

State ex rel. Washington Toll Bridge Authority v. Yelle, et al., Cause No. 36240, Washington Supreme Court, Decision of Dec. 13, 1963, 160 Wash. Dec.—, — P. (2d) — 1962. .....12, 13, 14, 22, 23

State ex rel. Washington Toll Bridge Authority v. Yelle, 56 Wn. (2d) 86, 351 P. (2d) 493. 13

United States v. California, 297 U. S. 175, 56 S. Ct. 420, 80 L. ed. 567, 1936..... 24

United States v. King County, 281 Fed. 686 (CCA 9, 1922)..9, 19, 28, 30, D-1, et seq, F-41

United States v. State Road Department of Florida, 255 F. (2d) 516, (5th Cir., 1958) 23, 28

United States v. Washington Toll Bridge Authority, 307 F. (2d) 330 (1962)..... .....8, 15, 19, 29, A-1 et seq

TABLE OF CASES—Continued

Page

United States v. Washington Toll Bridge Authority, 190 F. Supp. 95 (1960) ..... 8, 14, C-1 et seq

Wilmette Park District v. United States, 338 U. S. 411, 94 L. ed. 205, 70 S. Ct. 195 (1949) 21, 22, 24

TABLE OF STATUTES, TEXTS AND OTHER AUTHORITIES

Federal Statutes

26 USC 4261, 4271 ..... 11, 14, 15, 19, 23, 28, E-1, et seq, F-2

26 USC 6203 et seq. ..... E-2 et seq

26 USC 7401, 7402 9

28 USC 1254(1) 10

28 USC 2106 31

Public Law 87-508, June 28, 1962 14

Rules of the Supreme Court

Rule 19-1(b) 17

Rule 23-1(a) 8

Rule 23-1(h) 18

Washington Constitution

Art. 2, § 19 13

Amendment 18 12

Washington Statutes

Chapter 121, Laws of 1951 ..... 22, 23

Chapter 271, Laws of 1957 ..... F-19, F-20

Chapter 4, Laws of 1959, Ex. Sess. F-20

Chapter 9, Laws of 1961, Ex. Sess. 12, 13, 14

Miscellaneous

Willoughby, The Constitution of the United States, Second Edition, Volume I, ... 18, 19, 25

Bender, Federal Practice Manual, Volume I ... 31

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WASHINGTON TOLL BRIDGE AUTHORITY, *Petitioner*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS (NINTH CIRCUIT)

The Washington Toll Bridge Authority, an agency and instrumentality of the State of Washington, hereby respectfully requests this Honorable Court to issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, concerning

(1) The Judgment of the United States Court of Appeals for the Ninth Circuit, dated July 31, 1962 (TR 161-171) (Petition for Rehearing denied on September 26, 1962: TR 203);

(2) The Order of the United States Court of Appeals for the Ninth Circuit dated September 26, 1962, denying Petitioner's Alternative Motion to Remand for Further Proceedings. (TR 203)

A.

REFERENCE TO OFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW. (Rule 23-1(a))

(1) The Judgment of the United States Court of Appeals for the Ninth Circuit to which this Petition is directed is reported at 307 F. (2d) 330 (1962). (TR 161-171)

(Reproduced fully herein in *Appendix A.*)

(2) The Order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Petition for Rehearing and the Petitioner's Alternative Motion for an Order to Remand for Further Proceedings was entered on September 26, 1962. (TR 203)

(Reproduced fully herein in *Appendix B.*)

(3) The Opinion of the United States District Court for the Western District of Washington, which was reversed by the United States Court of Appeals, is reported at 190 F. Supp. 95. (TR 27-32)

(Reproduced fully herein in *Appendix C.*)

(4) In addition to the foregoing opinions of the courts below which are pertinent to this Petition, *Appendix D* contains, for the convenience of the

Court, the prior opinion of the United States Court of Appeals for the Ninth Circuit reported at 281 Fed. 686, which was relied upon by the trial court (TR 27-32) but was specifically overruled by the United States Court of Appeals for the Ninth Circuit by its opinion of July 31, 1962 (TR 161-171) (Appendix A).

B.

JURISDICTION.

This action was commenced by the United States in the United States District Court for the Western District of Washington, Southern Division, pursuant to 26 USC 7401, 7402. (TR 3-27, incl.)

Judgment was entered by the District Court in favor of the Petitioner on February 16, 1961, together with Findings of Fact and Conclusions of Law (TR 32-45) in accordance with a detailed Memorandum Opinion of the trial court. (TR 27-32; reproduced in Appendix C.) On appeal to the Court of Appeals for the Ninth Circuit, the Judgment of the trial court was reversed in an opinion issued July 29, 1962. (TR 161-170; App. A)

A Petition for Rehearing (TR 172-181) and an Alternative Motion for an Order to Remand (TR 182-202) were timely filed by petitioner in the Court of Appeals and both were denied by an order of the Court of Appeals on September 26, 1962. (TR 183; Appendix B)

The jurisdiction of this Court is invoked by the petitioner in these proceedings pursuant to 28 USC 1254 (1) providing for the issuance of writs of certiorari in cases before the several United States Courts of Appeal after rendition of the judgment and decree of the Courts of Appeal of the United States.

C.

QUESTIONS PRESENTED.

The questions presented by this Petition for Writ of Certiorari are as follows:

(1) Whether the Federal Government may impose a tax which interferes with and substantially burdens a State in the performance of a governmental function.

(2) Whether or not the Congress intended that the federal transportation tax should apply to the tolls paid by users of a public highway system when using portions of such a state highway system consisting of a public-operated ferry system.

(3) Whether the United States Court of Appeals erred in refusing to enter an order remanding this case to the United States District Court for further proceedings so as to permit the State of Washington to prove the extent of the burden of the federal tax in question upon the exercise of the governmental duty, power and function of the State of Washing-

ton, and the extent of the resultant interference with the petitioner's governmental duty, power and function.

D.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

(1) CONSTITUTIONAL PROVISIONS.

This case involves the constitutional principle that "* * * the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them * * * are exempt * * *" from taxation. (*Ohio v. Helvering*, 292 U. S. 360, 368.)

(2) STATUTORY PROVISIONS.

The portions of the Internal Revenue Code involved in this case ("The Federal Transportation Tax": 26 USC 4261 et seq) are set forth in Appendix E.

E.

STATEMENT OF THE CASE.

The petitioner is an agency and instrumentality of the State of Washington charged with the duty and authority to operate the "Washington State Ferries" as an integral part of the highway system of the State. (TR 27)

Since 1951 petitioner has operated an extensive ferry system on Puget Sound as part of the public highways of the State. (TR 27, 35, 36)

The ferry system in question is believed to be the largest of its kind in the United States. The necessity of the system is dictated by the geography of the area. The system provides vital links in the State's highway system connecting the State's highways and thereby avoiding circuitous land travel. (TR 37, 38)[1]

The trial court found that the operations of the ferries in question were in all respects identical to the operation and construction of toll bridges in the State of Washington. (F of F XV; TR 41) (In fact, a number of toll bridges have been constructed which replace routes formerly plied by ferries in petitioner's system.)[2]

> "By means of the ferries in question, the petitioner provides necessary public highways across the waters of the State of Washington." (F of F IX; TR 37-38)

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[1]This conclusion of the trial court affirmed by the Court of Appeals was restated on December 13, 1962, by the Washington Supreme Court in a decision upholding the constitutionality of legislation providing for the issuance of revenue bonds covering the Washington State Ferries and the Hood Canal Bridge backed up by a guaranty of gas tax funds. *State ex rel. Washington Toll Bridge Authority v. Yelle et al*, Cause No. 36240.

"Respondent urges as an additional objection that chapters 7 and 9, by authorizing a retention of a million dollars in the Puget Sound reserve account as a guaranty fund, violate the restriction in amendment 18 to the state constitution which requires all license fees and excise taxes derived from the sale of motor vehicle funds to be used exclusively for highway purposes.

"The Puget Sound ferry system and the Hood Canal bridge are both integral parts of the highway system. From what has been said, it is apparent that any loan from the Puget Sound reserve account will ultimately be repaid from tolls. Consequently, it is idle to say that the temporary employment of such funds to assist the development of the state highway system is within the diversion interdicted by the eighteenth amendment. The Puget Sound ferries operated by the state and the Hood Canal bridge are all indispensable links in the state highway system."

The trial court also found that the highway needs of the people of the State of Washington and the reasonable social and economic development of the State not only fully justify but require the nature and extent of the ferry system provided by petitioner. (F of F X, TR 38)

The acquisition and maintenance of Washington State Ferries has been financed by Public Revenue Bonds issued by petitioner. The costs of the operations of the system, and funds for retirement of such revenue bonds, are obtained from the system's revenue from *tolls* charged for use of its facilities, other income (payments from concessionaires) and other state tax funds.[3] (TR 37) (Appropriations by the legislature; funds from the

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[2] *State ex rel. Washington Toll Bridge Authority v. Yelle et al, supra*, described the situation as follows:

"The legislature has continuously considered toll bridges and ferries as a single operational unit for legislative purposes since 1949. Both form an integral part of the state highway system and cannot be regarded as separate subjects within Art. 2, § 19, of the state constitution." *Gross v. Washington State Ferries*, 159 Wash. Dec. 252, 367 P. (2d) 600; *Jeff Hunt Machinery Co. v. South Carolina State Highway Department*, 217 S. C. 423, 60 S. E. (2d) 859; *Deans v. County of Coconino*, 41 Ariz. 253, 17 P. (2d) 801; *Puget Sound Navigation Co. v. United States*, 107 F. (2d) 73; *Puget Sound Navigation Co. v. Department of Public Works*, 156 Wash. 377, 287 Pac. 52; *Savage Truck Line v. Commonwealth*, 193 Va. 237, 68 S. E. (2d) 510."

[3] In *State ex rel. Washington Toll Bridge Authority v. Yelle, supra*, the Washington Supreme Court discusses the integral relationship of ferries to the Washington Highway System in approving a single bond issue to refinance the Washington State Ferries and the Hood Canal Bridge.

It is a matter of common knowledge that the ferry system was purchased and the Hood Canal toll bridge was built with the proceeds of revenue bonds. *State ex rel. Washington Toll Bridge Authority v. Yelle*, 56 Wn. (2d) 86, 351 P. (2d) 493. It is, likewise, a matter of common knowledge that interest payments are frequently in jeopardy. With both the financial and judicial history of the problem freshly in mind, an informed legislature dealt with the problem in Laws of 1961, Ex. Ses., chapter 9, p. —, and endeavored to put the outstanding revenue bonds upon a sound financial basis by eliminating the possibility of default. There is such an intimate relationship

Governor's Emergency Fund; and certain other revolving funds financed by state gasoline taxes.) (See Appendix F.)

The Federal Government contends that the *tolls* charged by petitioner for use of the State Ferry System are subject to Federal transportation taxes. (TR 18-20) The assessments upon which the original complaint are based cover traffic from January 10, 1957 to September 30, 1957. (TR 40) Prior to these assessment periods, taxes were paid under protest for a while, then disputed and finally compromised pending settlement of this case. (TR 39)

Pursuant to a stipulation (TR 133) with the Federal Government, over a million dollars has been deposited with an escrow agent. Deposits to the fund ceased on November 15, 1962, in view of Public Law 87-508, June 28, 1962, which in effect repealed the Federal Transportation Tax except as to transportation by air. The funds on deposit will be distributed by the escrow agent upon final determination of this litigation.

After trial of the case before the United States District Court for the Western District of Washington, Judge Boldt reached the conclusion that "(1) the operation of the ferry system by petitioner was a governmental function, and as such was immune

between the public highways and the revenue bonds for both ferries and toll bridges that the refunding of such bonds is a single legislative purpose. The possible default of the revenue bonds of 1955 and 1957 was a matter of grave concern when the 1961 legislature convened in extraordinary session. It exercised an informed judgment that it would be in the public interest to consolidate them into a single refunded issue, which is authorized by chapter 9."

from federal taxation; (2) the statutes in question (26 USC 4261 et seq.: Appendix F) were never intended to apply to state operated ferry systems. * * *" (TR 42-43)

On appeal to the Court of Appeals for the Ninth Circuit, following hearings before a department of that court and then a rehearing en banc (TR 159), the judgment of the trial court was reversed. The opinion of the Court of Appeals (TR 161-171) to which this Petition is directed, concluded that:

(1) "* * * there is no constitutional immunity to collect and remit the taxes. * * *" (TR 167).

(2) The transportation tax *was* intended to apply to tolls collected by a state operated ferry system. (TR 168-169) However, since the petitioner is not "engaged in the business of transporting property for hire," the tax did not apply to those portions of the tolls representing charges for automobiles and trucks using the ferry system or other property moving over it. Accordingly, this case involves only the application of the Federal Transportation Tax to the tolls paid by individuals for passage over petitioner's facilities.

(3) The Court of Appeals also declared that

> "It is manifest that immunity of State activity here involved from the taxing power of the Federal Government cannot be successfully asserted on the *ad hoc* basis that such activity involves a governmental function. Attention

must be focused on the specific activity and on the nature and extent of interference with, or burden upon, the state, and this interference or burden must be actual and substantial, and not the creature of speculation and conjecture.

"Applying these teachings to the instant case, it is difficult to understand how the present tax unduly interferes with the State of Washington's function of government. The record is void of any tangible evidence to this effect." (TR 166)

Petitioner timely petitioned the Court of Appeals for a rehearing of the matter. (TR 172-181) Simultaneously, petitioner filed its Alternative Motion for an Order to Remand, etc. (TR 182-202). Petitioner sought procedural relief in order to show "* * * how the tax unduly interferes with the State of Washington's function of government," and that the effect of the tolls was "actual and substantial." (In accordance with the newly announced rule of the Court of Appeals. TR 166)

Affidavits in support of petitioner's Alternative Motion to Remand show that during the course of these proceedings, the petitioner's financial condition has steadily deteriorated and that the taxes in this case will of necessity be paid to the Federal Government from state tax sources other than revenue from the tolls paid to petitioner by users of the petitioner's ferry facilities. (TR 182-202) (See Appendix F.) (Actually, it was and is petitioner's contention that affidavits in support of the motion were unnecessary

because (a) the trial court specifically found that the petitioner's operations are supported in part by direct appropriation of taxes (TR 37), and (b) the Court of Appeals could have taken judicial notice of the Washington statutes referred to in the affidavits filed in support of the Motion for an Order to Remand.)

The Court of Appeals denied the petitioner's Motion and its Petition for Rehearing on September 26, 1962. This Petition was timely filed accordingly.

F.

REASONS JUSTIFYING REVIEW OF THIS CASE. (Rule 19-1 (b))

Petitioner respectfully submits that a Writ of Certiorari should be granted in this case because:

(1) The Court of Appeals Has Decided an Important Question of Constitutional Law Which Has Not Been, But Should Be, Decided By This Court.

(2) The Court of Appeals Has Decided an Important Question of Statutory Construction of Federal Law Which Has Not Been, But Should Be, Decided By This Court.

(3) The Court of Appeals Has Decided an Important Federal Question in Conflict With Applicable Decisions of This Court.

(4) The Opinions of This Court in *Ohio v. Helvering*, 292 U. S. 360, and *New York v. United States*, 326 U. S. 572, Should Be Reviewed and Reconciled.

(5) The Decision of the Court of Appeals (Ninth Circuit) Is in Conflict With Decisions of Other Courts of Appeal.

(6) The Lower Court Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings As to Call for an Exercise of This Court's Power of Supervision.

G.

DISCUSSION AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT. Rule 23-1 (h))

(1) The Court of Appeals Has Decided an Important Question of Constitutional Law Which Has Not Been, But Should Be, Decided by This Court.

The constitutional question precipitated by this case concerns the division of governmental powers between the National and State governments.

The case does not involve the undoubted supremacy of the National government in matters of sovereign power or powers essential to the existence of the Federal government. Rather, we are concerned here with the difficult problem described by Professor Willoughby as follows:

> "The maintenance of this (federal) supremacy unimpaired, while at the same time preserving to the states their proper autonomy and independence of action, has, however, been a difficult task; and so long as the Federal form is retained, this task will continue to tax, to the utmost, the legal and political abilities of our courts and political bodies." 1 *Willoughby*

on the Constitution of the United States, 2d ed., 130.

The lower court described the prior state of this area of constitutional law as follows:

> "It was recognized at the time of King County (*United States v. King County*, 282 U. S. 676 (1922); Appendix D) as it is now, that the control over, and the operation of, ferries is historically a governmental function. It was thought at the time of such decision and for some years thereafter, in order to preserve the independence of the state, that the Federal Government could not constitutionally impose a tax on state activities determined to be governmental in character as opposed to activities determined to be proprietary." *United States v. Washington Toll Bridge Authority*, 307 F. (2d) 330, 333. (TR 164)

The court then advanced into the trouble zone as follows:

> "In more recent years, however, this distinction has been recognized as an unsatisfactory and inconclusive guide for determining the immunity of a state activity from the federal taxing power." *U. S. v. Washington TBA, supra*, 333. (TR 164)

This proposition as applied to the facts of this case represents a new and important proposition which has not been, but should be, decided by this Court. It constituted the basis for determination by the Court of Appeals that the Federal Transportation Tax was applicable to tolls collected by the pe-

titioner in exercise of the governmental function involved in this case.

The foregoing challenged conclusion of the Court of Appeals purports to rest upon this Court's decisions in *Helvering v. Gerhardt*, 304 U. S. 405 (1938), and *New York v. United States*, 326 U. S. 572 (1946).

In *Helvering v. Gerhardt, supra*, the question was whether the imposition of the Federal Income Tax upon salaries of state employees placed an unconstitutional burden upon the Port of New York authority. The petitioner has no quarrel with *Helvering v. Gerhardt*. But petitioner challenges the applicability of the rule of that case to this one.

In *New York v. United States*, the question was whether a federal excise tax on carbonated beverages could be collected on the sale, by New York, of Saratoga Springs Mineral Water. This Court was sharply divided. The leading opinion was signed by Justices Frankfurter and Rutledge. A separate concurring opinion was issued by Chief Justice Stone and Justices Reid, Murphy and Burton, while Justices Black and Douglas dissented vigorously.

Petitioner accepts the holding of *New York* arguendo. But, it is respectfully submitted that the extension of the Frankfurter-Rutledge opinion to the facts of this case is a far-reaching and all-encompassing holding of manifest significance which should be reviewed by this Court.

Throughout the history of this Court, the states

have been assured that " * * * the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them * * * are exempt." *Ohio v. Helvering*, 292 U. S. 360, *supra*. If the lower court's opinion stands, it is clear that that assurance to the states has been nullified.

The question presented to the Court of Appeals in this case was brought into even sharper focus by petitioner's Motion for an Order to Remand (TR 182-202) (Appendix F) for further proceedings for the purpose of illustrating that the burden of the taxes involved here was "actual and substantial." In denying this Motion after having reaffirmed that the function of the State of Washington in this case is "governmental," the Court of Appeals has decided that no matter how "actual and substantial" the resultant burden and interference on the State's governmental function may be, there is *no* constitutional restriction on the power of the Federal Government to impose taxes on a state. The question thus presented to this Court is:

> *Can the Federal Government impose a tax which interferes with and substantially burdens the State's performance of a governmental function?*

None of the decisions of this Court heretofore cited and relied upon by respondent decide this important question in favor of the Federal Government.

Wilmette Park District v. Campbell, 330 US 471 (1949), and *Allen v. Regents of the University*

System of Georgia, 304 US 439 (1938), each involve the Federal Admissions Tax. *Ohio v. Helvering*, *supra*, approved collection of the federal liquor excise tax imposed on alcoholic beverages dispensed in liquor stores operated by Ohio.*

Respondent may argue that the tax is not "direct". But if certiorari is granted, petitioner will argue that the Federal tax in this case is just as direct and certain an interference with the performance of a governmental function as if the tax were imposed on each issue of revenue bonds issued by the petitioner to capitalize the establishment of the ferry system itself. Such interference by the Federal Government is unnecessary to preserve Federal supremacy and is unconstitutional.

(2) THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF STATUTORY CONSTRUCTION OF A FEDERAL STATUTE WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Petitioner will argue, in support of the Judgment of the trial court, that the legislative environment of the statutes in question (Appendix E) clearly indicates that the Congress never intended

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*Arguendo, petitioner will concede that a federal tax (i.e., a liquor excise tax, or a federal admissions tax) may apply to products and amusements dispensed by a state in the carrying out of its governmental functions (policing of the distribution of alcoholic beverages in the liquor tax situation. *Ohio v. Helvering*, 292 US 360; sale of mineral waters, *New York v. United States*, 326 US 572; or public education and health in the admissions tax situation; *Wilmette Park District v. Campbell*, 338 US 411; *Allen v. Regents*, 304 US 439).

Several essential characteristics and qualifications obviously distinguish those cases from this one: (1) The State can police the sale of alcoholic beverages or engage in public education without engaging in competition with private enterprise; (2) a tax paid by the purchasers of alcohol or athletic admissions tickets or mineral water *does not* deprive the states of revenue or otherwise inter-

that the Federal Transportation Tax should apply to tolls paid to a state government in operating a state ferry system which is a part of the state public highway system. No other federal court has construed the statute in question as the Court of Appeals in this case. Indeed, petitioner contends that the decision in question is in conflict with a recent decision of the Court of Appeals for the Fifth Circuit. Consequently the State of Washington is, so far as we know, the only state to suffer assessments for taxes of the kind in question.

The statutes in question were substantially repealed by amendments in the last Congress. Nevertheless, the amount of tax which is involved, the

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fere with or place a burden upon the exercise of the state's police power or any other governmental function. Furthermore, the sale of liquor, mineral water and dispensation of amusement are not traditional governmental functions.

TOLLS are as much a "means" of conducting government as TAXES, per se. In *State ex rel. Washington Toll Bridge Authority v. Yelle, et al, supra*, the Washington Supreme Court in discussing § 4, chapter 121 of the Laws of 1951 (Washington) providing for pledges of tax funds as guaranties of anticipated toll bridge revenue bonds stated:

"What justified such a provision in that statute and the provision of similar import in the statutes now before us is that the people of this state—conceiving that excise taxes on the sale, distribution, and use of motor vehicle fuels were, in a very real sense, tolls for the use of the highways—provided, by a constitutional amendment, that such excise taxes should be paid into a special fund for highway purposes only; and, since the state can issue bonds for highway purposes payable from that special fund, the implication is that it can covenant that the excise taxes directed by the constitutional amendment to be paid into the fund will be adequate for the payment and servicing of the bonds."

In *United States v. State Road Department of Florida*, 255 F. (2d) 516 (5th Cir, 1958), the Court considered only taxes applied to tolls for passage of automobiles over a single ferry operated by Florida as a link of its highway system. The Court concluded that the tax was not intended to apply to the tolls there involved. The Court of Appeals for the Ninth Circuit follows the Fifth Circuit to the extent that the tax does not apply to automobiles or other property passing over Washington ferries, but it does apply to the drivers of cars and other passengers.

deposit of funds in escrow pending final settlement (TR 133 et seq), and the relationship of this question of statutory interpretation to the substantial and important question of constitutional law are such that both questions should be decided by this Court.

(3) THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner has shown that no prior decision of this Court permits the Federal Government to impose a tax which actually and substantially interferes with or burdens a state's function of government. Consequently, the decision of the Circuit Court permitting assessments for such a tax is an unprecedented decision which has not been, but should be, decided by this Court.

On the other hand, in several decisions by this Court sustaining various federal taxes in situations involving activities other than customary or traditional "governmental" activities, this Court has given recognition to the right of state government to carry out governmental functions without interference or burden from federal taxes.

Ohio v. Helvering, 292 US 360

Wilmette Park District v. United States, 338 US 411

United States v. California, 297 US 175

That a state may not, in the exercise of its powers, interfere with an agency of the Federal

Government was settled once and for all by the decision of this Court in *McCulloch v. Maryland*, 4 Wheat 316.

And at least until recently, it was recognized that this Court required some degree of reciprocity from the Federal Government with respect to the states and their agencies; provided, of course, that only governmental activities may be exempted. 1 *Willoughby on the Constitution of the United States*, 2nd edition, p. 165.

This case calls into question whether there is really any reciprocity in this area of constitutional law at all. Petitioner submits that certiorari is warranted accordingly.

(4) OHIO V. HELVERING, SUPRA, AND NEW YORK V. UNITED STATES, SUPRA SHOULD BE RECONCILED.

In *Ohio v. Helvering*, *supra*, this Court declared that the governmental functions of a state are exempt from the interference of federal taxes. But a divided court in *New York v. U. S.*, *supra*, suggests (without deciding definitely) that the traditional line of governmental versus proprietary functions of state government is no longer useful in determining the validity of federal taxes applied to activities of state governments.

In *New York v. United States*, *supra*, three different opinions were issued as to whether or not mineral waters bottled by New York State should be subject to a federal excise tax. Petitioner has no

quarrel with the result reached here, but we challenge here the application of the leading two judges' opinion to the facts of this case. We submit, also, that the language in *New York v. United States* which was relied on by the Circuit Court, in rendering the decision challenged here, is fundamentally inconsistent with other decisions of this court, if not also inconsistent with the theory and purpose of *New York v. United States* itself.

The proposition stated by Frankfurter and Rutledge is inconsistent with this Court's holding in *Ohio v. Helvering, supra.* Furthermore, in the concurring opinion in *New York v. United States, supra,* Chief Justice Stone and Justices Reid, Murphy and Burton held that:

> "* * * only when and because the subject of taxation is state property or a state activity is it necessary to consider whether the tax even though non-discriminatory, unduly interferes with the performance of the state's function of government. If it does, then the fact that the tax is non-discriminatory does not save it. * * * It is plain that the invalidity is due wholly to the fact that it is a state which is being taxed so as unduly to infringe, in some manner, the performance of its functions as a government which the constitution recognizes as sovereign." *New York v. United States, supra,* 90 L ed at 337.

In the case at bar, we submit that the subject of tax is a "state activity" which is purely govern-

mental. Therefore, at least the rule of the concurring opinion of Justices Stone, Reid, Murphy and Burton would permit petitioner to establish the extent of interference with the performance of the State's function of government. Petitioner draws the same conclusion from *Ohio v. Helvering, supra.* But the leading opinion of *New York* suggests a contrary conclusion and the Court of Appeals followed that suggestion.

In either event, the two opinions of *New York v. United States* are inconsistent with each other, not to mention the vigorous dissents of Justices Black and Douglas and the unanimous opinion of this Court in *Ohio v. Helvering.*

We suspect that the factual situation presented by this case is exactly the situation which Justices Douglas and Black had in mind when they dissented in *New York v. United States.*

This petition, *therefore,* affords the Court an opportunity to clarify this problem area, i.e., the relationship of the states to the Federal Government in these circumstances, and to harmonize the decisions of this Court in *Ohio v. Helvering* and *New York v. United States.*

(5) THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL.

As indicated earlier, the lower court reversed its own earlier decision that a tax exactly like that involved here, results in an unconstitutional inter-

ference with and burden upon state government. (*United States v. King County*, 281 Fed 686 (1922))

The *King County* case was cited with approval by the Court of Appeals for the Fifth Circuit (*United States v. The State Road Department of Florida*, 255 F (2d) 516 (1958)). In the Florida case the Federal Transportation Tax involved only a tax on tolls for passage of automobiles (as "property"; 42 USC 4271 et seq).

The Court (Fifth Circuit) concluded that Congress never intended to impose the tax in such situations because the state could not be said to be a "person engaged in the business of transporting property for hire". (42 USC 4271 et seq).

The Ninth Circuit purported to follow the Fifth Circuit to this extent. So the tax in this case applies to a driver of a car and other "passengers" but not to the automobile he drove, during the periods that the tax on transportation of property was in effect.

Even though the Fifth Circuit had thus disposed of its problem, it indicated quite clearly that the tax would have been unconstitutional if it had been applicable to the tolls charged by the State for use of the highway facility involved there.

In *Jamestown Newport Ferry Co. v. Commissioner of Internal Revenue*, 41 F (2d) 920 taxes assessed against income from tolls collected in maintaining ferries and highways were stricken by the

Court of Appeals (Second Circuit). That decision holds that taxes cannot be assessed upon a state's income from such governmental activities.

It is respectfully submitted, that to have permitted an income tax in *Jamestown v. Newport Ferry Co., supra*, would have been less onerous than the tax here. Presumably, the Federal Government would not have collected a tax unless the Jamestown Newport Ferry had shown some net income after allowance for depreciation, overhead, etc.

(6) THE LOWER COURT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The crux of the lower court's opinion is that

> "* * * Immunity of State activity * * * from the taxing power of the Federal Government cannot be successfully asserted on the *ad hoc* basis that such activity involves a governmental function. *Attention must be focused on the specific activity and on the nature and extent of interference with, and burden upon, the state; and this interference or burden must be actual and substantial.*
>
> "Applying these testings to this instant case, it is difficult to understand how the present tax unduly *interferes with the State of Washington's function of government. The record is void of any tangible evidence to this effect.*" (U. S. v. T. B. A., supra, Tr. 166)

It is true that no evidence was offered to show the severe effect that a 10% tax on tolls would have

and has had upon the exercise of the State of Washington's function of government in this case.

The principal reason is simply that no such showing was required under *United States v. King County*, 281 Fed 686 (CAA 9, 1922). (See Appendix D). The holding of *King County* was absolutely dispositive of the law of this case until the lower court specifically reversed itself by the opinion to which this Petition is directed.

Although petitioner disagreed with the lower court, petitioner requested the Court of Appeals to remand the case (TR 182-202) in order to establish what the Court itself had just declared was esesntial, to-wit:

> (1) "* * * the nature and extent of interference with or burden upon the state * * *"
>
> (2) and that the burden of the taxes was and is "* * * actual and substantial * * *"

The petitioner's Motion for an Order to Remand was supported by affidavits indicating the nature of the facts which support these conclusions. (TR 182-202)

Nevertheless the petitioner's Motion was denied by the Court of Appeals. (TR 203, Appendix B.). This procedural error is, we submit, a clear case of departure from the usual course of judicial proceedings calling for an exercise of this Court's power of supervision.

Petitioner's Motion for an Order to Remand the case to the trial court for further proceedings, although unusual, only asked the Court of Appeals to exercise in a very conservative way, the liberal powers vested in the federal courts. The action which the Court of Appeals could have taken may be compared to *Gairing Tool Co. v. Eclipse Interchangeable Counterbore Co.*, 49 F (2d) 73, 75-66 (CCA-6th, 1930). (Cf 6 Bender, *Federal Practice Manual* 3863.)

The procedure contemplated by petitioner's Motion for an Order to Remand, etc., is clearly proper according to 28 USC 2106, providing:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances."

Likewise, an order by the Court of Appeals pursuant to 28 USC 2106 would have been proper and is indicated by the facts of this case.

If certiorari is granted, petitioner will argue that at the least an order should be entered in favor of petitioner pursuant to the authority vested in this Court which will permit petitioner on remand to show that the burden and interference of the tax in question is actual and so substantial as to un-

constitutionally interrupt the division of governmental powers now in balance between the State and Federal governments.

WHEREFORE, the petitioner prays that this Honorable Court issue its Writ of Certiorari to the United States Court of Appeals, Ninth Circuit, for the purpose of considering the questions discussed in the foregoing Petition.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General,
State of Washington,
Temple of Justice,
Olympia, Washington,

JOHN W. RILEY,
Special Assistant Attorney General,
535 Central Building,
Seattle, Washington,

Attorneys for Petitioner.

Dated at Olympia, Washington,
this 19th day of December, 1962.

SCHEDULE OF APPENDIXES

Appendix A: Decision of U. S. Court of Appeals (9th Cir.) (307 F. (2d) 330 (1962)) Reversing 190 F. Supp. 95.

Appendix B: Order of U. S. Court of Appeals (9th Cir.) Denying Petition for Rehearing and Denying Motion for Order to Remand (Sept. 26, 1962).

Appendix C: Decision of United States District Court in and for the Western District of Washington, Southern Division (190 F. Supp. 95 (1960)).

Appendix D: Decision of the United States Court of Appeals (9th Cir.) (281 F. 686 (1922)).

Appendix E: Text of Federal Statutes Involved in These Proceedings.

Appendix F: Petitioner's Alternative Motion before the U. S. Court of Appeals for Order to Remand, etc.